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In the

Supreme Court of the United States

OCTOBER TERM, 1954

No. [redacted]83

THE HOUSING AUTHORITY OF THE CITY OF DALLAS,
Petitioner,

v.

EDDIE THOMAS, *et ux.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS AND BRIEF IN SUPPORT THEREOF

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

To the Honorable Supreme Court of the United States:

Your petitioner is: The Housing Authority of the City of Dallas, a municipal corporation created under and by virtue of Article 1269K, Vernon's Texas Civil Statutes, with its principal place of business in Dallas, Dallas County, Texas.

Respondents are: Eddie Thomas and wife, private citizens, domiciled within Dallas County, Texas.

Petitioner respectfully shows:

SUMMARY STATEMENT OF THE MATTER INVOLVED

Petitioner instituted eminent domain proceedings in the County Court at Law No. 1, Dallas County, Texas, under and by virtue of Articles 3264, et seq., of the 1925 Revised Texas Civil Statutes for the purpose of acquiring the real estate owned by the Respondents within Dallas County, for a low income public housing project authorized under the Federal Statutes, particularly U. S. Housing Act of 1937, Public Law 412, 75th Congress, 50 Statutes 888, 42 U.S.C. Sec. 1401, et. seq., as amended by the Housing Act of 1949 Public Law 171, 81st Congress, 63 Statutes 413, 42 U. S. C. 1401, et seq., consisting of thirty-five hundred units. Under Article 3264, 1925 R. C. S. a condemnation board was appointed and after a hearing, made an award to the said Eddie Thomas and wife, in the amount of $2,775.00 as the value of the property taken. Within ten (10) days' time as provided by statute, Eddie Thomas and wife filed their appeal claiming the award as insufficient. On the 17th day of July, 1951, the Housing Authority of the City of Dallas, desiring to take immediate possession of the property, deposited into the registry of the court the amount of the award as provided by Article 3268, 1925 R. C. S., and took possession. On the 31st day of July, 1951, Respondent filed a motion and an affidavit with the Judge of County Court at Law No. 1 in which he sought to withdraw the amount of money deposited, which the court permitted to be done. (R. 16.) On the 24th day of September, 1952, Petitioner

was granted a Summary Judgment (R. 20) in said cause, because the Respondent had withdrawn the amount of the award from the registry of the court, which made the question of sufficiency of the award moot, and that Respondents accepted the amount of the award as full satisfaction of the amount due for the property taken under the eminent domain proceedings. Respondents prosecuted an appeal to the Court of Civil Appeals of the 11th District of Texas sitting at Eastland, Texas, where judgment of the trial court holding the question to be moot was affirmed. (See opinion, *Eddie Thomas, et al. v. The Housing Authority of the City of Dallas, 258 S. W. 2d 428.)*

Upon application of Respondents, the Supreme Court of Texas granted a Writ of Error, and rendered a judgment reversing the judgment of the two inferior courts, and held that the question was not moot and that Respondents had the right to withdraw the money from the registry of the court and still prosecute their appeal. (See opinion of the Supreme Court, *Thomas v. The Housing Authority of the City of Dallas, 264 S. W. 2d 93.* Opinion was rendered December 16, 1953.) (R. 25.)

Petitioner in its Motion for Rehearing for the first time raised the federal question involved. (R. 30.) The motion was overruled by the Supreme Court of Texas on the 24th of February, 1954. (R. 61.)

This suit is one of thirty (30) similar suits, in which the Petitioner is plaintiff, which are now pending in the trial courts of Dallas County, Texas. (R. 36.)

JURISDICTIONAL STATEMENT

This Honorable Court has jurisdiction under Section 1257(3) of Title 28 of the United States Judicial Code because:

> (a) The interpretation placed upon Article 3268, Revised Texas Civil Statutes 1925, as amended, operates to deprive petitioner of property without due process of law, contrary to the Fourteenth Amendment of the United States Constitution, because such an interpretation of the statute denies to the condemnor equal protection of the law and grants unequal privileges, rights and remedies to condemnee not enjoyed by the condemnor.

Article 3268, Revised Texas Civil Statutes 1925, as amended, reads as follows:

Art. 3268. 6530, 4471, 4205 Damages Paid First.

If the plaintiff in the condemnation proceedings should desire to enter upon and take possession of the property sought to be condemned, pending litigation, it may do so at any time after the award of the commissioners, upon the following conditions, to-wit:

1. It shall pay to the defendant the amount of damages awarded or adjudged against it by the commissioners, or deposit the same in money in court, subject to the order of the defendant, and also pay the costs awarded against it.

2. In addition thereto, it shall deposit in said Court a further sum of money equal to the amount of the damages awarded by the Commissioners, and which shall be held, together with the award itself, should it be deposited in Court instead of being paid, exclusively to secure all damages that may be awarded or adjudged against the plaintiff; and it shall also execute a bond with two or more good and solvent sureties, to be approved by the Judge of the Court in which such condemnation proceedings are pending, conditioned for the payment of any further costs that may be adjudged against it, either in the Court below or upon appeal. The State, a county, municipal corporation, irrigation district, water improvement district or water power control district created under authority of law, shall not be required to deposit a bond or the amount equal to the award of damages by the Commissioners as provided in Section 2 hereof. As amended Acts 1930, 41st Leg., 4th C. S., p. 75, ch. 37 § 1; Acts 1934, 43rd Leg., 2nd C. S., p. 89, ch. 37 § 2.

3. Should it be determined on final decision of the case that the right to condemn the property in question does not exist, the plaintiff shall surrender possession thereof, if it has taken possession pending litigation, and the court shall so adjudge and order a writ of possession for the property in favor of the defendant, and the court may also inquire what damages, if any, have been suffered by the defendant by reason of the temporary possession of the plaintiff, and order the same paid out of the award or other money deposited; provided, that in any case where

the award paid the defendant or appropriated by him exceeds the value of the property as determined by the final judgment, the court shall adjudge the excess to be returned to the plaintiff.

If the cause should be appealed from the decision of the county court, the appeal shall be governed by the law governing appeals in other cases; except the judgment of the county court shall not be suspended thereby. Const. Art. 1, Sec. 17; Acts 1899, p. 105.

(b) The construction placed upon Article 3268, Revised Texas Civil Statutes, 1925, as amended, which brings about the above result is not a necessary construction of the statute, but is the result of misconception of the language with a total disregard of the mutual rights and remedies of the parties to an eminent domain proceedings.

(c) If the interpretation placed upon the statute is the only and necessary interpretation, then such statute is invalid and results in the denial of due process and equal protection to the petitioner, contrary to the Fourteenth Amendment of the United States Constitution.

(d) Since the petitioner, a municipal corporation, organized under the laws of the State of Texas, operates with federal funds advanced to it by a public agency of the United States Government under authority of U. S. Housing Act of 1937 as thereafter

amended, the interpretation of the statute, as placed upon it by the Supreme Court of Texas places in jeopardy federal funds and will materially increase the cost of the so-called low-rent Federal Housing Projects in Texas.

FEDERAL QUESTIONS PRESENTED

1.

It is specifically urged that the Petitioner, as a result of the decision of the Supreme Court of Texas, has been denied equal protection of the law in that the rights and remedies of the parties to this suit are not equal and do not guarantee both parties the same rights and privileges.

2.

Article 3268 of the Revised 1925 Texas Civil Statutes, the basis of this suit, has been construed by the Supreme Court of Texas in such a way as to render the results violative of equal protection and due process of the law to the condemning party, because such an interpretation of the statute as made is not necessary.

3.

In the alternative if such a construction of the statute is necessary, then the validity of the eminent domain statute, particularly Article 3268 of the Revised 1925 Texas Civil Statutes, is drawn in question because if the statute requires such an interpretation, then it results in the denial of equal protection to the parties and deprives the con-

demnor of property without due process of law. The sole and only purpose of Article 3268, Revised 1925 Texas Civil Statutes, as amended, was to implement the constitutional means under which the condemnor could go into possession pending final litigation. However, the court has placed an interpretation on the statute, and if such interpretation is correct, then the result is repugnant to the Fourteenth Amendment of the United States Constitution in that it deprives the condemnor of property without due process of law. Therefore, the statute, as construed by the Supreme Court of Texas, is invalid.

4.

Article 1, Section 17 of the Texas Constitution provides that:

> "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the state, such compensation shall be first made, or secured by a deposit of money;"

If Article 3268, Revised 1925 Texas Civil Statutes, is correctly construed by the Supreme Court of Texas, which gives the right to the condemnee to withdraw the security placed into the court and continue to litigate for more, then such statute not only violates the Texas Constitution, but applies unequally to the parties to the litigation contrary to the provisions of the Fourteenth Amendment of the United States Constitution.

5.

Since the various Housing Authorities in the State of Texas and elsewhere operate with federal funds advanced to them by an agency of the United States Government, the construction placed upon the statute by the Supreme Court of Texas places in jeopardy federal funds, which will be lost and will increase the cost of low-rent Housing Projects in Texas if the judgment of the Supreme Court of Texas is permitted to stand in this case, because:

(1) In the event the award is reduced by the jury in the County Court and the condemnee has withdrawn the security and wasted it, the condemnor will have no way of recovering the *excess* except by a general judgment against a person who may or may not be solvent.

(2) It will encourage litigation or foment litigation on the part of the condemnee and cause the condemnors unnecessary expense and waste, and cause them to pay more for property taken than is required by Article 1, Section 17 of the Texas Constitution and by the Fourteenth Amendment of the United States Constitution.

6.

That the construction placed on Article 3268, 1925 R. C. S., as amended, does not apply equally and secure equal rights and remedies, and thus violates both the Texas and the Federal Constitution, becomes apparent when we con-

sider that the Texas courts have held that the title to property involved in eminent domain proceedings cannot be divested out of the owner unless and until the adjudged amount finally due and payable has been paid.

7.

Since an eminent domain proceedings statute, which provides that the property owner will get paid for his property by a general judgment without further security, does not meet the requisite of Art. 1, Sec. 17 of the Texas Constitution and has therefore been declared void *(B. B. B. Ry. Co. v. Ferris, 26 Tex. 588)*, does it not follow that the present statute is void if by judicial construction it puts the condemnor to that kind of a remedy to recover any excess deposit, or the entire deposit in the event of abandonment of the condemnation or in the event the right to condemn does not exist in favor of condemnor?

8.

That in the event the deposit made is insufficient to cover the judgment finally awarded as the value of the property, the trial court is powerless to make the decree divesting the property owner of title until the amount is paid and that he has a lien on such property to secure the payment, which can be enforced by execution, without securing to the condemnor the absolute right to recover any excess deposited, violates the due process clause of the United States Constitution.

9.

Does the judgment of the Supreme Court of Texas deny the Petitioner equal protection of the law, as between the litigants in an eminent domain proceeding, by holding that the property owner, after the award is made and deposited into the registry of the court so that the condemnor may take immediate possession of the premises, may withdraw the money, waste it, and then still litigate over the value thereof, and in the event the judgment is reduced, the condemnor will have only a general judgment against an insolvent party?

10.

Since under the decisions of the Supreme Court of Texas and the United States Supreme Court, an eminent domain proceeding is a proceeding in rem and whenever the award (money) is deposited into the registry of the court so that the condemnor may take immediate possession, the money represents the res, and if the Respondent is given the right to take it regardless of whether the amount of the award is exorbitant or insufficient and still litigate the matter, as held by the Supreme Court of Texas, is the statute or the judicial construction thereof violative of the Fourteenth Amendment of the United States Constitution by putting the condemnor in the position of having to litigate an empty shell for the reason that it will have only a general judgment for the excess deposit, which may not be enforceable or collectible due to insolvency of condemnee, and thus put

the condemnee in a favored position as against that of the condemnor.

11.

Since the Petitioner, The Housing Authority of the City of Dallas, operates with funds appropriated by Congress and with the proceeds of loans guaranteed by a Federal Agency under the Act of Congress and such monies are advanced to The Housing Authority, which it in turn uses to make these deposits in order to take immediate possession of the premises and proceed with the construction of the improvement, the funds of the United States Government are placed in jeopardy by permitting the condemnee to withdraw the subject matter of litigation and still litigate over its value, which action is repugnant to public policy, and likewise amounts to a denial of equal protection of the litigants under the Texas law in eminent domain proceedings, as construed by the Supreme Court of Texas.

12.

Eminent domain statutes of Texas have been construed by our Texas courts uniformly for many years, holding that the property owners could not withdraw the award of the commissioners from the registry of the court and still litigate the matter, and the Legislature has reenacted such statutes in the light of such decisions without change, and as such these decisions have become a rule of property, which the present opinion of the Supreme Court of Texas

destroys and puts the condemnor at the mercy and whim of dealing with a solvent or insolvent condemnee, thus denying equal rights and remedies to the condemnor.

13.

Since the eminent domain statute applies to the state and all political subdivisions and private corporations which have the power of eminent domain delegated to them by law, it is clear that since all of these public bodies and public service corporations necessarily handle either taxpayers money or trust funds, they are by this decision of the Supreme Court of Texas placed in a position of being denied equal protection of the law.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1.

Petitioner has been denied equal protection of the law in this case because the Supreme Court has sanctioned the following:

(a) The withdrawal of the security required to be deposited into the registry of the court to secure the payment for the property taken under eminent domain proceedings, Art. 1, Sec. 17 of the Texas Constitution.

(b) The Supreme Court of Texas has sanctioned the withdrawal of such security on an ex parte affidavit filed in the trial court. (R. 16.) A real estate man made the affidavit that the property subject of

condemnation was worth more than twice the amount of the award of the commissioners.

(c) The Court has sanctioned the withdrawal of the deposit which is the res of the litigation and has sanctioned the dissipation, wasting, and removal from the jurisdiction and control of the trial court the said subject matter of litigation and still permit the land owner (Respondent) to litigate over the value of the subject matter of the litigation after he had appropriated it to his own use.

(d) The Supreme Court of Texas has sanctioned the withdrawal of the money which has been paid into the court as security to insure payment when the litigation is completed and the final sum is adjudicated to be due, thus placing the Petitioner in the position of litigating a hopeless and fruitless cause because if it wins, it will have no assurance that it will get the money returned to satisfy its judgment; whereas, on the other hand, the Respondent or condemnee is given full assurance that he cannot be divested of title to his property until the condemnor actually pays him in cash at the time the divesture of title is made by the decree of the court.

Parenthetically the deposit of money into the registry of the court is not a partial tender, but if it is a tender, it is a tender in full satisfaction of the value and damages to the property taken. Thus, the court wholly ignored the main and sole purpose of Article

3268, R. C. S. 1925, and that is to give the condemning party right to immediate possession pending litigation.

The purpose of Art. 3268, R. C. S. 1925, is solely to enable the condemnor to go into immediate possession so that important public work be not delayed. Section 1 of said Article, which provides that the condemnor shall pay the amount of the award to the land owner or deposit the same into the registry of the court as security, simply means, under a long line of adjudicated cases, that if payment is made directly to the owner, that is the end of the litigation because the condemnor has paid for and purchased the property. However, if the land owner does not accept the money, the condemnor can pay the money into the registry of the court "to the order of the defendant," and thus get possession immediately, even during the ten-day period in which the land owner has to decide whether or not he will appeal from the award. When he appeals from the award, it is nullified and a trial de novo results with a trial as in other civil cases. (See Art. 3268, R. C. S. 1925.)

(e) The decision of the Court operates unequally from another standpoint. The Condemnee can withdraw the money (the deposit which Art. 1, Section 17 of the Texas Constitution requires to be made) and he gets the title to the money because it is spendable as legal tender even though it represents the res of the litigation. On the other hand the Condemnor does

not get title to anything and cannot get title until a final judgment of condemnation is entered subject of course to full payment of the final judgment.

(f) Where is there any equality of rights and remedies? Again, under established case law in Texas, the Condemnor has the legal right to abandon the condemnation but it must pay Condemnee any legal damages that he may have suffered either by dispossession or physical injury to land or improvements. If the land owner takes the deposit and is insolvent and the land subject to condemnation is a homestead, and therefore exempt from execution, then Condemnor has lost the money (the deposit). The legal effect is that Condemnor is deprived of the legal right to abandon the condemnation and if it takes the lands and does not use it for the purpose condemned, the land will revert back to the Condemnee. He will have his land and Condemnor's money and thus be unjustly enriched. Does the law operate equally on both parties?

(g) Still another case arises under this statute that follows under this holding by the Texas Supreme Court: In case the court holds that Plaintiff has no power to condemn and it had gone into possession, by making the deposit under Article 3268, the money deposited should be available to make restitution by way of damages for the detention, reasonable rental, physical damage to land or improvements. Under this decision, the land owner can take the deposit beyond the jurisdiction or control of the court and spend the

money freely. How will Condemnor be made whole in this case? Will a general judgment satisfy the 14th Amendment? Yes, it can get an offset on the damages, but it cannot get a lien on the homestead property to recover the balance.

The Supreme Court has heretofore awarded legal rate of interest on the total final award from date of dispossession and considered it as adequate compensation for the detention of the use of the property.

Prior to the *Thomas* decision Condemnor had the right:

1. To deposit award and take immediate possession and was obligated to pay interest on total final award. With the security deposit intact in the possession of the court as long as the landowner was appealing, it was assured that it would not suffer any loss by virtue of availing itself of the right to immediate possession.

2. It had the right to abandon condemnation and pay compensation for dispossession and damages to land and improvements, if any.

3. It was obligated in the event it was decided that the power of condemnation did not exist, to pay compensation for illegal dispossession with damages to land and improvements.

The Thomas decision now impairs each of the above rights by taking away its property without due process of law by granting to Condemnee the absolute right to appropriate the (deposit) money and relegate the Condemnor

to the precarious remedy of a general judgment to enforce its rights:

(1) To recover the excess of the deposit when the court or jury reduces the award.

(2) To recover a judgment against the Condemnee for the amount of the deposit less any offset for detention and damages, in the event of abandonment of condemnation by it.

(3) To recover a judgment against Condemnee for the amount of deposit less offset for illegal dispossession and damages to land and improvements, in the event it be declared without right to condemn.

Are these rights equal as between the Condemnor and Condemnee? Are these respective remedies against each other equally effective? Do these remedies afford equal protection of the law? Is not the Condemnor put in the position of being effectively deprived of property without due process of law? The answers are self evident.

It is believed that the rights and remedies of the parties to a litigation must be mutual in that the condemnor should be required to pay full and adequate compensation and no more and on the other hand the land owner should receive adequate compensation and no more and no less than adequate compensation. He should not be in the position of having an advantage of taking condemnor's money, which represents the subject matter of the litigation when condemnor enters into possession, and then take his chance before

a jury or a court of getting more or having the amount reduced and then putting the condemnor in the position of having a general judgment without any security or assurance that he will collect. In this we believe that due process has been denied, because the land owner has absolute assurance that he will get whatever is finally adjudged to be the value of the land taken, but the condemnor has only the right to a general judgment for any excess deposit withdrawn and no certainty of collecting the judgment.

CONCLUSION

WHEREFORE, your Petitioner respectfully prays that this application for writ of certiorari to the Supreme Court of Texas be granted and that the judgment of the state court be reversed and for such other and further relief to which Petitioner shall be justly entitled.

Respectfully submitted,

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APPENDIX

Revised 1925 Texas Civil Statutes
Art. 3266. 6507-28 General Provisions, Sects. 6 and 7

6. If either party be dissatisfied with the decision, such party may within ten days after the same has been filed with the county judge file his objection thereto in writing, setting forth the grounds of his objection, and thereupon the adverse party shall be cited and the cause shall be tried and determined as in other civil causes in the county court.

7. If no objections to the decision are filed within ten (10) days, the County Judge shall cause said decision to be recorded in the minutes of the County Court, and shall make the same the judgment of the court and issue the necessary process to enforce the same. As amended, Acts 1941, 47th Leg., p. 872, ch. 543, § 1.

Article 1, Section 17 of the Constitution of the State of Texas

Sec. 17. No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money; and no irrevocable or uncontrollable grant of special privileges or immunities, shall be made; but all privileges and franchises granted by the Legislature, or created under its authority shall be subject to the control thereof.

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Respondents.

To the Honorable Supreme Court of the United States:

Petitioner has raised the federal questions in this cause for the first time on its motion for a rehearing as there was no occasion for raising them until after the decision of the Supreme Court, because it has relied upon the adjudicated cases and the rule of Stare Decisis. This was timely under the decision in the case of *Brinkerhoff-Faris Trust & Savings Company v. Hill, 281 U. S. 673, 74 L. Ed. 1107.* The necessity for raising this question arose when the Supreme Court rendered a decision in this cause wholly dis-

regarding a consistent interpretation of the statute, which had become a rule of property, by the Supreme Court and the Intermediate Appellate Courts of Texas over a period of fifty years. These interpretations by the Court of the statute have been made over this period of years in the light of the fact that the statute was twice re-enacted and twice amended by the legislature without a change material to this controversy. Up to this time, not a single case can be found where the land owner had the right to withdraw the award of the commissioners and still prosecute his appeal. Under this statute as it existed in 1895, the following cases arose and each held against the landowner's right to withdraw the award and still prosecute his appeal. *Fort Worth Ice Co. v. Twombley, 31 S. W. 81; Fort Worth Ice Company v. C. R. I. & P. R. Co., 33 S. W. 159.* As the statute then existed if the landowner refused to accept the award, the Condemnor could not go into possession, so in 1899 the statute was amended to permit the Condemnor to deposit double the amount of the award, give bond as security for costs, and it could then go into possession.

The next decisions following the precedent set by the above decisions and interpreting the Act of 1899, appears in 1904 in the case of *Parks v. Dallas Terminal Ry. & Union Depot Co., 78 S. W. 533.* The Legislature in 1911 re-enacted what is now Article 3268 in the same terms and again in 1919 the Court followed the same precedent in the case of the *City of Rosebud v. Vitek, 210 S. W. 728.* The Supreme Court of Texas dismissed an application for writ of

error in this case. Again the statute was re-enacted in 1925 and in 1926 in *Texarkana and Ft. Smith Ry. Co. v. Brinkman, 288 S. W. 852*, the Court again reiterated that "The Appellee (landowner) could not have accepted the deposit and received the same without abandoning his appeal." This case was reviewed by the Supreme Court of Texas and affirmed in *292 S. W. 860*. The statute was amended in 1931 and in 1934, which merely had the effect of exempting municipal corporations from making double the deposit and bond for costs. In 1937 the Courts again construed Article 3268 to the effect that the landowner could not withdraw the award and prosecute his appeal. See *Hopkins v. City of Dallas, 106 S. W. 2d 783*. The Court there said,

> "To accept the benefits of a judgment while prosecuting an appeal to have it set aside as erroneous is clearly an instance of such inconsistency, giving him, in case of reversal, an undue advantage over his antagonist, and embarrassing the proceedings in the Trial Court."

The Supreme Court of Texas refused a writ in the *Hopkins* case, which means under the Texas rule that it is equivalent to the Supreme Court of Texas itself writing or approving the opinion. *Heinatz v. Allen, 217 S. W. 2d 994*.

The first time where any withdrawal of deposited fund was allowed appears in the case of *Brazos River Conservation and Reclamation District v. Allen, 166 S. W. 2d 388*. In that case the Condemnee did not appeal and was satisfied. In that decision the Court clearly made the distinc-

tion of the landowner accepting or appealing in the following language:

> "If, under such circumstances, the landowner accepted the award, that would mark the end of the controversy so far as he would be concerned and he could not prosecute an appeal."

To the same effect is the *Housing Authority of the City of Dallas v. Dixon, 250 S. W. 2d 636.* There the Court said:

> "The cases cited by Appellant where the owner of the land condemned was Appellant or appealing party are not in point. Here Appellees are not appealing from or complaining of the judgment of the County Court, they are willing to abide by and are seeking to sustain it."

Thus we see that the Supreme Court of Texas has by judicial decree overruled all the previous holdings, including its own decisions, upon which Condemnor has relied by depositing the money into Court and has been guided thereby to find itself now in a grave position of disadvantage, and particularly because it has thirty similar such cases pending. Similarly this same situation was reviewed by the Supreme Court of the United States in the case of *Brinkerhoff-Faris Trust & Savings Company v. Hill, 281 U. S. 673*, where the Supreme Court of Missouri had consistently interpreted a tax statute to the effect that it was not necessary to exhaust administrative remedies before a Court of equity would interfere with an illegal or discriminatory assessment. When Plaintiff in the above case reached the Supreme Court of Missouri, it reversed

itself and for the first time held that it was necessary to exhaust the administrative remedies before resorting to a court of equity for relief in identical cases. But the time had elapsed for such administrative remedies and therefore the Plaintiff found itself being deprived of a day in court or a chance to be heard. The Supreme Court condemned such an action and held that by judicial interpretation of a statute the rights of the Plaintiff were violated, it being denied rights under the Fourteenth Amendment of the United States Constitution, and particularly the due process provisions thereof. So it is in the case before the court. Condemnor, the Petitioner, in reliance upon an unbroken line of adjudicated cases approved by re-enactments by the Legislature, had deposited the money into the registry of the Court (the amount of the commissioners' award) in order to go into possession with the assurance of the previous adjudication of the Court, including the Supreme Court of Texas, that the money would not be withdrawn and dissipated by the landowner unless the landowner by withdrawing the award abandoned his further prosecution or appeal of the case. As a result, the Condemnor is left without effective remedy to recover any excess which has been withdrawn by the landowner. The Supreme Court of Texas had held in the case of *B. B. B. & C. R. R. Co. v. Ferris, 26 Tex. 588,* that an eminent domain statute which provided that the landowner would recover a general judgment for the value of his land and damages which he had to enforce by general execution was unconstitutional as not complying with what is now Art. 1, Sec. 17 of the Texas

Constitution as not assuring certain and sure payment. But now under this holding, if the Condemnor succeeds in reducing the award, it will get a general judgment which is enforceable only by execution if the former landowner is still solvent. The Petitioner, having deposited the money in this and thirty other cases in which the Courts have allowed the deposit to be withdrawn, now finds itself in a position of suffering the loss in each case in which the award is reduced. Had the declared law been otherwise it could have protected itself by not making the deposit and litigating first to a final judgment and paid the exact amount due then. The change here in the decision of the Court is not one of *procedure* but is *one of abolishment* by judicial decree of a property right. This property right of the Condemnor had been fixed *not only by the Courts previous interpretations*, but by successive re-enactments by the Legislature and subsequent re-interpretation by the Supreme Court of Texas.

Article 3268 provides that when there is an appeal from the award of the commissioners, the case stands for trial as any other case, and in the event of an appeal to a higher court after trial in the court of first instance, it is governed by the same rules as other cases. By an unbroken line of decisions, the Supreme Court of Texas has approved holdings of inferior courts that a person cannot take the fruits of a judgment and still prosecute his appeal. *Dunham v. Randell & Chambers, 32 S. W. 720; Harper v. Foster, 40 S. W. 40; Cameron v. Hinton, 92 Tex. 492, 49 S. W. 1047.*

Yet, in the face of the express language of the statute, the Supreme Court of Texas in this case holds that the landowner can take the fruits of a judgment and still prosecute his appeal. Particularly is the result of the decision in this case erroneous because this is a proceeding in rem so that the landowner is literally in the position of appropriating the subject matter of the litigation with the blessing of the court and still litigate for more. If he gets more, the Condemnor must pay before he can get title to the land. If he gets less, the Condemnor can recover the money only if the Condemnee is solvent. Is this a just result?

Considering the judicial interpretation of the statute by the several Intermediate Appellate Courts and the Supreme Court itself, the Legislature has clearly indicated its acceptance of this judicial construction by its acquiescence in such construction over a period in excess of fifty years. It is therefore strongly urged that the doctrine of stare decisis overrides all the considerations when the Supreme Court of Texas overturned all the adjudicated cases dealing with the issue involved. The argument is perhaps best stated by Justice Brandeis in the well-known quotation from his dissenting opinion in *Di Santo v. Pennsylvania, 273 U. S. 34, 42 (U. S. Supreme Court 1927)*, with which dissenting opinion Mr. Justice Holmes concurred:

> "It is usually more important that a rule of law be settled, than that it be settled right. Even where the error in declaring the rule is a matter of serious concern, it is ordinarily better to seek correction by legis-

> lation. Often this is true although the question is a constitutional one. The human experience embodied in the doctrine of *stare decisis* teaches us, also, that often it is better to follow a precedent, although it does not involve the declaration of a rule. This is usually true so far as concerns a particular statute whether the error was made in construing it or in passing upon its validity."

While appellate courts may differ in their attitudes regarding the weight to be accorded the doctrine of stare decisis, it is firmly believed that an appellate court exceeds its judicial function when it overrules statutory construction decisions of long standing, because those decisions have become as much an integral part of the statute as if they were originally written into it. This principle is supported by numerous authorities cited under the following statement from 21 Corpus Juris Secundum, pages 388-390:

> "The doctrine of stare decisis applies with full force to decisions construing statutes or ordinances. In fact, when a statute has been judicially construed by the highest court having jurisdiction to pass on it such construction is as much a part of the statute as if plainly written into it originally, unless such construction will affect contract or property rights. However, while such decisions should not be disturbed unless there are cogent reasons for holding that the former construction was erroneous, the rule is not so absolutely fixed as to preclude the overruling of decisions which are plainly erroneous.
>
> "*Effect of acquiescence.* This rule is especially applicable where the construction placed on a statute by previous decisions has been long acquiesced in by the

> legislature, by its continued use or failure to change the language of the statute so construed, the power to change the law as interpreted being regarded, in such circumstances, as one to be exercised solely by the legislature."

The first Texas Supreme Court in a statutory construction case very aptly set forth this doctrine in the following language:

> "The rule of *stare decisis*, so far as it applies to decisions of our own court, should not be disregarded, but on the fullest conviction that the law has been settled wrong; and even then we should pause and consider how far the reversal would affect contracts and transactions entered into and acted upon, under the law of the Court." *Sydnor v. Gascoigne, 11 Texas 449, 455 (Texas Supreme Court 1854)*, (Opinion by Justice Lipscomb).

The latest reaffirmation of this attitude of the Texas Supreme Court regarding the great weight to be given the principle of stare decisis in statutory construction cases is in *Thompson v. Kay, 77 S. W. 2d 201, 207-208 (Texas Supreme Court 1934)*, (Opinion by Justice Greenwood). Another recent forcible statement of the doctrine is found in *Baten v. Thornhill, 145 S. W. 2d 608, 611 (Beaumont Court of Civil Appeals 1940, writ ref'd)*, (Opinion by Justice Walker).

Very strong statements of this principle are also found in the opinions of the United States Supreme Court. See *Missouri v. Ross, 299 U. S. 72, 75 (U. S. Supreme Court 1936)*, (Opinion by Justice Sutherland); *Gulf, Colorado &*

Santa Fe Railway Company v. Moser, 275 U. S. 133, 136 (U. S. Supreme Court 1927), (Opinion by Justice McReynolds).

It is strongly urged that the rule of stare decisis enunciated above should be adhered to in this case because it lends itself to a continuation of settled law, preserves the integrity of orderly procedure, of contracts, and acts of parties in reliance thereupon.

The Supreme Court of Texas and the inferior appellate courts, whose judgments are reviewed or reviewable by the Supreme Court, have established the guaranties of adequate compensation to the land owner (condemnee) by holding:

(1) That the title to real estate cannot be divested out of the condemnee unless and until, concurrently with its divestiture, the condemnor pays in cash to him the amount of damages finally adjudicated. (See *City of San Antonio v. Astoria, 67 S. W. 2d 321.)*

(2) That the property owner has a lien on the property condemned to secure his payment. (See *City of Laredo v. Benevides, 25 S. W. 482.)*

(3) That where the property owner appeals, he cannot withdraw the money from the registry of the court, under which deposit the condemnor has taken possession, without abandoning his appeal, but that he is entitled to the legal rate of interest from the date of possession. (See *City of Rosebud v. Vitek, 210 S.*

W. 728, and *Texarkana & Fort Smith Ry. Co. v. Brinkman, 288 S. W. 852, affirmed by S. Ct. 292 S. W. 860.)*

(4) That wherever the money, adjudged as the sum due is deposited and the land owner has withdrawn the money, it has been treated as full satisfaction and further appeal becomes moot. (See *Hopkins v. City of Dallas, 106 S. W. 2d 783; Parks v. Dallas Terminal & Ry. & Union Depot Co., 78 S. W. 533*, and *Fort Worth Ice Co. v. Twombley, 31 S. W. 81.)*

(5) That when an appeal is filed from the award of the condemnation commissioners, the case stands on the docket for trial as any other civil case, and that the appeal can be most informally written (See *Fitzgerald v. City of Dallas, 34 S. W. 2d 682).*

(6) That when an appeal is filed from the award of the condemnation commissioners, the trial results in a trial de novo and the award is nullified, so that as in this case the award was nullified and the amount deposited represents a tender in full. (See *Kennedy v. City of Dallas, 201 S. W. 2d 840.)*

(7) That an eminent domain statute, which does not absolutely guarantee payment to the property owner has been declared void in the case of *B. B. B. Ry. Co. v. Ferris, 26 Tex. 588.* In that case, the eminent domain statute provided that a property owner will be paid by a general judgment for the value of his land and damages, enforceable only by execution.

The Supreme Court held this to be violative of what is now Art. 1, Sec. 17 of the Texas Constitution, and not absolutely guaranteeing payment to the condemnor.

To the above is now added the right to withdraw the money (the award) and still litigate the value and damages for land taken.

As a necessary result of the judgment of the Supreme Court of Texas in this case, in contrast, the condemnor's rights and remedies are as follows:

1. In the event it desires to go into possession pending litigation on appeal, it must deposit into the registry of the court the amount of the award, regardless of how exorbitant it is, which the condemnee has the right to withdraw (the res of the litigation) and take its chances of recovering the excess upon final adjudication by a general judgment with a precarious chance of collecting it.

2. In case of abandonment of the condemnation proceedings, which the condemnor has the unquestioned right to do up to a certain stage of the proceedings *(City of Sherman v. Williams, 296 S. W. 663)*, if the condemnee has withdrawn and dissipated the deposit, then it can of course get a general judgment which it may or may not be able to collect.

3. In cases where it is finally adjudicated that the condemnor lacks the power to condemn and went into possession and the condemnee has withdrawn the deposit and

dissipated it, then in that event the land itself is returned to the owner, but for the deposit which has been appropriated by the condemnee, condemnor has only a general judgment which may or may not be enforceable.

In each of these cases it is quite apparent that the condemnee has been unjustly enriched at the expense of the condemnor. When it is considered that the landowner has absolute protection and assurance of being paid before he is divested of title, it is clear that the condemnor has no assurance or certainty that it will recover its money from the condemnee in either of the cases above mentioned.

WHEREFORE, PREMISES CONSIDERED, your Petitioner respectfully submits that the writ of certiorari should be granted and upon final hearing that the judgment of the Supreme Court of Texas be reversed and that of the trial court and the intermediate appellate court be affirmed.

Respectfully submitted,

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JUN 15 1954
HAROLD B. WILLEY, Clerk

In the

Supreme Court of the United States

OCTOBER TERM, 1953

No. [redacted] 83

THE HOUSING AUTHORITY OF THE CITY OF DALLAS, TEXAS,
Petitioner,

v.

EDDIE THOMAS, ET UX,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION OF WRIT OF CERTIORARI

MIKE MCKOOL AND BERT BADER,
Counsel for Eddie Thomas, et ux, Respondents.

MCKOOL & BADER,
Of Counsel for Respondents.

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In the

Supreme Court of the United States

OCTOBER TERM, 1953

No. 774

THE HOUSING AUTHORITY OF THE CITY OF DALLAS, TEXAS,
Petitioner,

v.

EDDIE THOMAS, ET UX,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION OF WRIT OF CERTIORARI

May It Please the Court:

Respondents respectfully submit that the petition for Writ of Certiorari in this case should be denied because:

A. This case involves only a question of local law, i. e., the construction and application of a Texas Statute which provides a method whereby the condemnor, if it so desires, can take possession of the landowner's property before the condemnation is completed.

B. There is no denial of due process nor denial of equal protection of the laws in violation of the 14th Amendment of the United States Constitution in the construction of this Texas Statute where the Statute merely provides a method whereby the condemnor can take possession of the landowner's property after the rendering of the commissioners' award and prior to final judgment.

The Supreme Court of Texas has construed Article 3268 of the Revised Civil Statutes of Texas. The Judgment of the Texas Supreme Court is conclusive as to the construction and application of the State Statute and State Constitution. *Senn v. Tile Layers Protective Union, Local No. 5, 57 Supreme Court, 857, 301 U. S. 468, 81 Law Edition 1229; Aero Mayflower Transit Co. v. Board of Railroad Commissioners of the State of Montana, 68 Supreme Court, 167, 332 U. S. 495, 92 Law Edition 99.* Therefore, the only contention that could be made by the petitioner that would present a federal question would be that the statute under which they proceeded to condemn the landowner's property is unconstitutional. That is, the only right which the petitioner has to condemn the landowner's property is given to them by the very statute which they are seeking to hold unconstitutional. If the statute were unconstitutional, then the petitioners are in the position of being mere trespassers on the property of the landowner because they would have no right or authority to condemn under the very statute which they contend is unconstitutional. We must keep in mind the construction of the statute by the Supreme Court of Texas which is as follows (R. 26):

> "First, we should keep in mind that there is no requirement in the law that the landowner be dispossessed and his property delivered to the condemnor during the pendency of the litigation. Neither is it required that the condemnor make a deposit unless he desires possession of the landowner's property during the pendency of litigation."

Needless to say, it cannot be contended that a statute is unconstitutional because it deprives the condemnor of due process of law and equal protection of the laws, where the condemnor has a choice of whether he desires to go into possession of the landowner's property pending a final hearing of the case. It must be remembered that the condemnor does not have to go into possession pending a hearing before the County Court but can wait until the hearing before the County Court, when the rights of the parties are fixed and the value of the landowner's property is determined. However, if the condemnor desires to go into possession of the property before a final hearing in the County Court, then the condemnor must deposit the amount of the Commissioners' award, which the landowner can withdraw. In other words, the choice is that of the condemnor. If the condemnor chooses to deprive the landowner of the possession of his property pending a final hearing of the case, then the landowner is entitled to the deposit, which takes the place of his property. If the condemnor has any fears that the final judgment of the County Court will be less than that awarded by the Commissioners, then the condemnor need not take possession of the property pending a final hearing of the case. The choice is wholly that of the condemnor. Surely it cannot be contended that a statute deprives a con-

demnor the protection of the laws and due process of law where the choice is wholly that of the condemnor. The statute is not one that requires a condemnor to take possession but merely provides a means whereby the condemnor can take possession prior to final disposition of the case, if the condemnor so desires. However, if the condemnor deprives the landowner of his property prior to final disposition of the case, then the condemnor must make available to the landowner the amount of the Commissioners' award which takes the place of the landowner's property. The procedure is not unconstitutional, but is in accordance with Article 1, Section 17 of the Constitution of the State of Texas and the 14th Amendment of the United States Constitution.

In Lewis on Eminent Domain, 3d Edition, Vol. 2, Sec. 843, page 1471, it states:

> "Where the damages have been deposited and received by the owner, and, on appeal, a less sum is awarded, it has been held proper to enter judgment against the owner for the amount he is liable to refund."

The condemnor has not been deprived of any constitutional rights in this case and in fact, the holding of the Supreme Court of Texas is in accord with the Constitutional provision that the landowner should not be deprived of his property without adequate compensation being paid.

C. The construction of the Texas Statute by the Texas Supreme Court is in accord with Rule 71-A (j) of the Federal Rules of Civil Procedure.

Rule 71-A (j) of the Federal Rules of Civil Procedure, Title 28, of the U. S. C. A. is in accord with the construction by the Texas Supreme Court of Article 3268. The Federal Rule is as follows:

> "The plaintiff shall deposit with the Court any money required by law as a condition to the exercise of the power of eminent domain; and, although not so required, may make a deposit when permitted by statute. In such cases the Court and attorneys shall expedite the proceedings for the distribution of the money so deposited and for the ascertainment and payment of just compensation. If the compensation finally awarded to any defendant exceeds the amount which has been paid to him on distribution of deposit, the Court shall enter judgment against the plaintiff and in favor of that defendant for the deficiency. If the compensation finally awarded to any defendant is less than the amount which has been paid to him, the Court shall enter judgment against him and in favor of the plaintiff for the overpayment."

In the case of *Dohany v. Rogers, 281 U. S. 362, 74 Law Edition 904, 50 Supreme Court, 299*, this Honorable Court construes the statute that was in effect prior to passage of Rule 71-A of the Rules of Civil Procedure on August 1, 1951.

> "When the declaration is filed, the amount of estimated compensation is to be deposited with the Court to be paid as the Court may order, 'for or on account' of the just compensation to be awarded the owners. Thus the acquisition by the government of title and immediate right to possession, and the deposit of the estimated compensation occurs as steps in the main proceeding. The purpose of the Statute is two-fold. First, to give the government immediate possession of

> the property and to relieve it of the burden of interest accruing on the sum deposited from the date of taking to the date of judgment in the eminent domain proceeding. Secondly, to give the former owner, if his title is clear, immediate cash compensation to the extent of the government's estimate of the value of the property."

D. Petitioner cites no authority in support of its Petition for Writ of Certiorari to show the procedure violates the 14th Amendment of the United States Constitution.

The petitioner cites no authority in support of their application for Writ of Certiorari showing that the construction of this Texas Statute is unconstitutional. Condemnation is not a new proceeding in the law and there have been condemnation proceedings throughout the United States since our country was first founded. There have been numerous cases decided and numerous textbooks written on the law of condemnation and petitioner has not cited one case to this Honorable Court showing that the payment to the landowner at the time the condemnor takes possession is unconstitutional. The presumption must therefore be that there is no authority for the position taken by petitioner except its assertion that it is so. Petitioner's brief in support of the Writ in this case spends a great deal of time talking about stare decisis and re-enactments of Article 3268 by the Texas Legislature. Respondents would show the Court that this was the first time that the Supreme Court of Texas has ever been called upon to decide and construe this particular statute. The Supreme Court, in their opinion, frankly admit that there were decisions by the inter-

mediate Courts of Texas which support both views of the question (R. 26). Respondents would show the Court that the Texas Supreme Court has construed this statute which is a question of local law, and that construction is binding upon this Honorable Court.

Respondents pray that the Writ of Certiorari be denied.

Respectfully submitted,

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